

Supreme Court, U.S.

FILED

APR 27 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1520

IN THE
Supreme Court of the United States
October Term, 1989

COOK INLET TRIBAL COUNCIL,
C.A.A. and C.M.F.,
A Tribal Indian Mother and Her Minor Child,
Petitioners,

V.

CATHOLIC SOCIAL SERVICES, INC.,
C.G. and S.G.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

STATE OF ALASKA
DEPARTMENT OF HEALTH
AND SOCIAL SERVICES
Douglas B. Baily
Attorney General

D. Rebecca Snow *
Assistant Attorney General
100 Cushman, Suite 400
Fairbanks, Alaska 99701
(907) 452-1568

April 27, 1990

* Counsel of Record



TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
REASONS FOR ISSUING THE WRIT	2
ARGUMENT	4
CONCLUSION	15
APPENDIX	App. 1

TABLE OF AUTHORITIES

CASES

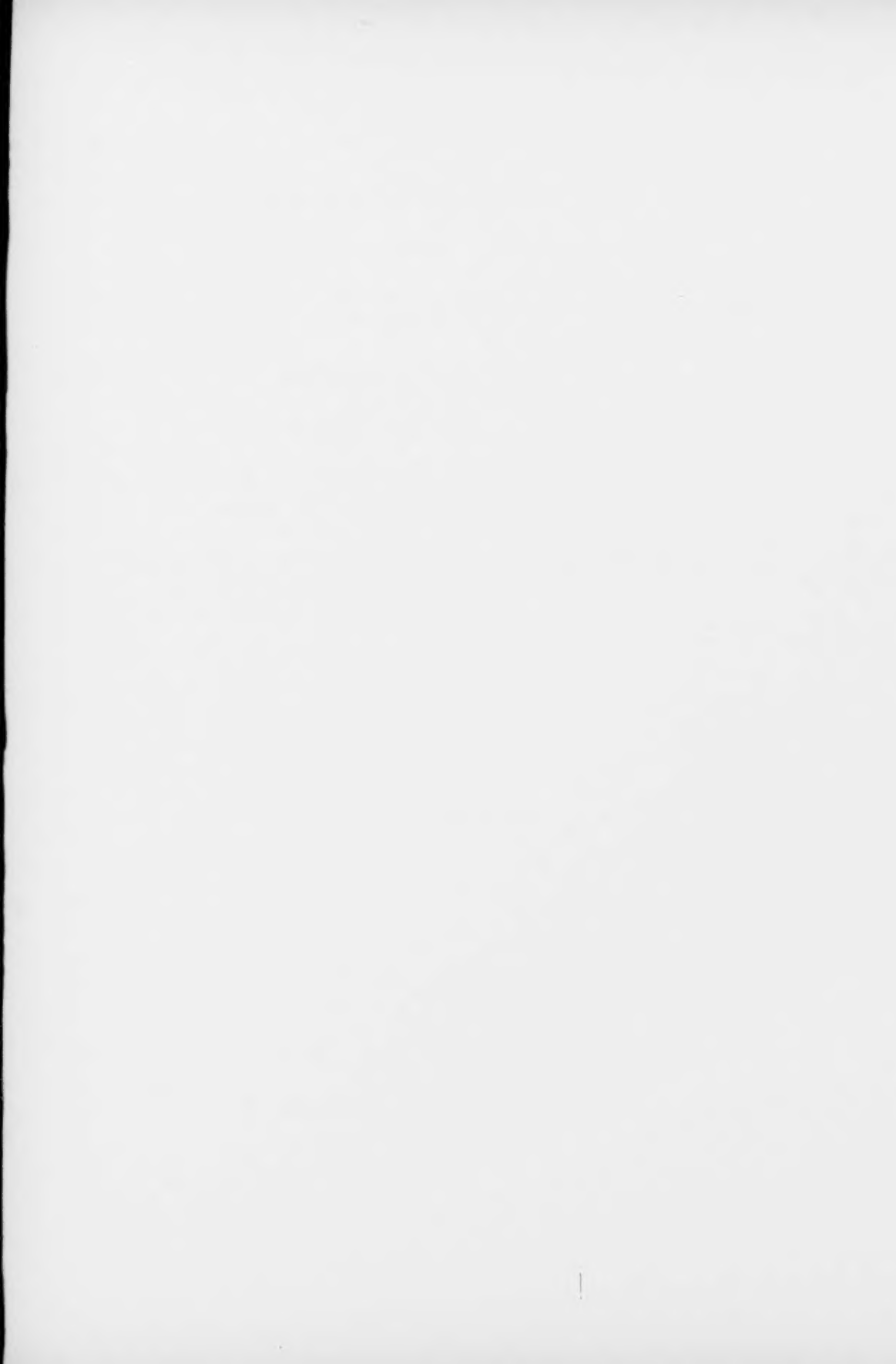
In re Adoption of Halloway, 732 P.2d 962 (Utah 1986)	. . . . .	11
Catholic Social Services; Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989)	. . . . .	2
In re J.R.S., 690 P.2d 10 (Alaska 1984)	. . . . .	7
Mississippi Band of Choctaw Indians v. Holyfield, ___ U.S. ___, 109 S. Ct. 1597 (1989)	. . . . .	3, 5, 11
Smith v. Organization of Foster Families, 431 U.S. 816, 97 S. Ct. 2094 (1977)	. . . . .	8

FEDERAL STATUTES

25 U.S.C. § 1901(4)	. . . . .	5
25 U.S.C. § 1902	. . . . .	5
25 U.S.C. § 1911(c)	. . . . .	6, 7, 8
25 U.S.C. § 1913	. . . . .	6, 7
25 U.S.C. § 1915(a)	. . . . .	6, 7, 9

STATE STATUTES AND CODES

AS 25.23.180	.	.	.	.	.	1
AS 25.23.100(d) (e) (f)	.	.	.	.	.	1
AS 25.23.200	.	.	.	.	.	1
AS 47.05.010(7)	.	.	.	.	.	1
AS 47.05.060	.	.	.	.	.	1
AS 47.35.100(a) (2)	.	.	.	.	.	2
7 AAC 51.200(c)	.	.	.	.	.	13



INTEREST OF AMICUS CURIAE

The State of Alaska, Department of Health and Social Services, submits this amicus curiae brief in support of the petition for a writ of certiorari filed by the tribe, mother and child in Cook Inlet Tribal Council, C.A.A. and C.M.F. v. Catholic Social Services, Inc. C. G. & S.G., No. 89-1520.

The Department of Health and Social Services (Department) is the state agency in Alaska mandated to provide services to children and their families. AS 47.05.-010(7); AS 47.05.060. The Department's duties include a variety of adoption related responsibilities, such as taking relinquishments of parental rights, making adoptive placements, conducting placement investigations in certain cases and licensing adoption agencies. E.g., AS 25.23.-

180; AS 25.23.100(d)(e)(f); AS 25.23.200; AS 47.35.100(a)(2). Although the Department is not the exclusive adoption agency in Alaska, it arranges a significant number of adoptions each year, many of which involve Indian children, and licenses private adoption agencies. The Indian children and parents to whom it provides services, and the agencies it regulates, are therefore directly affected by the Alaska Supreme Court's holding in Catholic Social Services; Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989) that tribes have no right to notice of voluntary termination proceedings involving Indian children under the Indian Child Welfare Act (ICWA).

REASONS FOR ISSUING THE WRIT

The Alaska Supreme Court has decided this important issue of federal Indian law

in a way that conflicts with this Court's related decision in Mississippi Band of Choctaw Indians v. Holyfield, ___ U.S. ___, 109 S. Ct. 1597 (1989) and with other decisions. As a result, adoption can no longer represent a safe haven for Native American children in Alaska. Rather these children, who are usually too young to advocate for themselves, will be set adrift in a process that evades all the protections Congress established in ICWA. Further, it subjects these children and their adoptive families to uncertain futures rather than the stability they need, because of the prospect of having the adoption voided for a procedural defect or want of jurisdiction. It also subjects agencies like the Department, that are trying to comply with ICWA's purpose and standards, to conflicting procedural requirements based on whether

the child's tribe is in Alaska or not. Finally it creates for the Department conflicting standards for regulating the placement practices of the adoption agencies it licenses. Only this Court can compel application of a uniform standard of notice in ICWA adoptions, thus preserving the rights for children and tribes that Congress created in ICWA.

ARGUMENT

The statutory arguments regarding the conflict between the Alaska Supreme Court decision and Holyfield are well presented in petitioners' brief. The Department believes that the effect of the Alaska notice decision on Indian children and those trying to serve them also compels granting certiorari.

Congress adopted ICWA to counteract forces at work throughout the country that

undermine Indian families and deprive tribes of their posterity. 25 U.S.C. § 1901(4). Congress responded to the problem by declaring that its policy is

to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the placement of [Indian children] in foster or adoptive homes which reflect the unique values of Indian culture....

25 U.S.C. § 1902.

This Court has acknowledged the significance of adoptions into non-Indian homes in separating Indian children from their families and tribes. Holyfield, 109 S. Ct. at 1600. These separations often have long term adverse effects on the adopted children. Id., n. 1. They also cut off the tribes' primary avenue for transmitting and thus preserving their heritage. Since the children involved are

usually too young to voice a preference or too inexperienced to foresee all the ramifications of an adoptive placement, Congress appropriately gave tribes the means to defend their interest in their children, and the children's interest in their tribes, in state court proceedings through intervention. See 25 U.S.C. § 1911(c).

ICWA addresses two areas of concern in Indian adoptions: ensuring that the parent is giving up the child knowingly and voluntarily (25 U.S.C. § 1913) and ensuring that the child is placed in a culturally appropriate home (25 U.S.C. § 1915(a)). As long as the parent is not being coerced or tricked into relinquishing, the tribe's primary concern is placement. The tribe's most significant contribution is likely to be in identifying culturally appropriate placements,

as Congress recognized by the powers it gave the tribe to vary the placement preferences and to set the standards for applying them. See 25 U.S.C. § 1915(c), (d). Even the Alaska Supreme Court has recognized that the tribe is the "placement preference system's most obvious defender" in adoptions. In re J.R.S., 690 P.2d 10, 14-15 (Alaska 1984). The Alaska Court went even further to conclude that a tribe's interest in its children's placement gave it a right to intervene in adoptions, although the court based that right on state law, not ICWA. J.R.S., 690 P.2d at 17-19, 15. 1/

1/ In J.R.S. the mother's rights had already been terminated in a child in need of aid proceeding, so the Alaska Supreme Court failed to recognize that adoptions could be an "action resulting in the termination of the parent-child relationship" in which ICWA does give the tribe the right to intervene. See, J.R.S., 690 P.2d at 12; 25 U.S.C. 1913(a)(i), (ii); 25 U.S.C. 1911(c).

The powers Congress granted tribes surely underscore its recognition of the great weight to be accorded the tribes' interest in their children's adoptions. Together with the statutorily created right to intervene when parental rights are going to be terminated (25 U.S.C. § 1911(c)), the tribe's substantial interest must give rise to minimum due process rights of notice and an opportunity to be heard. See Smith v. Organization of Foster Families, 431 U.S. 816, 839-47, 97 S. Ct. 2094, 2107-2111 (1977).

Yet even while bolstering the rights of tribes, Congress balanced them with the children's and parents' rights. For the child waiting to be adopted, two of the most critical factors for healthy transition and development are to be settled in a permanent home as quickly as possible

and to be free from changes of placement and uncertainty regarding where the child belongs. The child needs consistent nurturing from a parent figure to develop the type of parent-child relationship that will form the basis for future healthy relationships. See Beyond the Best Interests of the Child, J. Goldstein, A. Freud, A. Solnit, 17-20, 31-35 (1973). For each child's sake then, the permanent placement should be made as early as possible and should not be vulnerable to later attack on substantive and procedural grounds.

The best way to protect the child against a disruption of placements that might be required by failure to comply with ICWA's placement preferences (25 U.S.C. § 1915(a)) is to encourage early intervention by the child's tribe. Without notice of an impending adoption

being required at some point, the tribe's right to intervene is meaningless.

Requiring notice to the tribe at some stage of the proceeding certainly represents a minimum level of due process necessary to effectuate the tribe's statutory right of intervention. Requiring it when the matter first comes to court will tend to reduce harm to the child from late tribal intervention and disruption of an adoptive placement. The parent's relinquishment or consent to adoption is usually the first contact the courts have with a proposed adoption of an Indian child, thus providing the earliest formal opportunity for tribes to become involved. Prompt notice of a parent's relinquishment or consent to adoption is thus the best legal mechanism to put tribes on notice of their need to advocate

for a placement that preserves the child's tribal ties.

Not requiring notice sets up situations where there is no check on an agency's placements with non-Indian families, thus depriving the child of critical tribal or cultural ties, or where the placement is challenged well after a parent-child relationship has formed because the tribe inadvertently discovers the adoption, thus traumatizing the child and family. See Holyfield, 109 S. Ct. 1597; In re Adoption of Halloway, 732 P.2d 962 (Utah 1986). Equally significant is the fact that without notice to the tribe the child has no way of obtaining an advocate for the child's right to maintain tribal or cultural ties. Resolution of the notice issue is essential to the stability and security of adoptive families as well. The notice issue requires

the same level of uniformity attainable only from an interpretation by this Court as did the domicile question resolved in Holyfield. Otherwise, an adoption of an Indian child may be vulnerable to attack depending on what jurisdiction the family moves to. In such cases, the child again bears the primary brunt of the uncertainty and disruption that may ensue, because the child is least equipped to understand or compensate for the machinations of the adult world.

Finally, the Department faces an unacceptable dilemma in trying to enforce compliance by the agencies it licenses and regulates with ICWA's requirements and the Alaska Supreme Court's notice ruling. On the one hand the Department concurs with the Congressional findings that Indian children are usually better served by placement with extended family members or

culturally appropriate families. The Department believes this policy to be fundamental to good social work. The Department's regulations therefore set certain expectations for placement preferences which may be "superseded by state or federal law." 7 AAC 51.200(c). The tribe is often the best source for discovering such placements. All the provisions of ICWA seem to anticipate including the tribe in finding the most appropriate placement for the child. Yet the Alaska Supreme Court's decision challenged here cuts off the tribe's opportunity to participate. The predictable result is that agencies following the Alaska decision will be placing Indian children primarily in non-Indian homes. If a tribe then inadvertently discovers one of its children has been placed in a non-complying home and moves to enforce

the child's and tribe's rights, the child will again inevitably bear the brunt of the resulting delay and instability.

CONCLUSION

It is critical to Native American children needing adoptive placements, and to those trying to serve them, that this Court resolve the issue of the notice of pending adoptions due to the children's tribes. Both the children's and the tribe's rights to preserve their cultural identity will be undermined if notice to the tribe is not recognized as a uniform due process requirement under ICWA. More particularly, C.M.F., the child affected by these proceedings, should be spared extended uncertainty and delay in establishing her permanent placement by this

Court's summary reversal of the Alaska
Supreme Court decision.

Respectfully submitted,

State of Alaska
Department of Health and
Social Services
Douglas B. Baily
Attorney General

D. Rebecca Snow *
Assistant Attorney General
100 Cushman, Suite 400
Fairbanks, Alaska 99701
(907)452-1568

April 27, 1990

* Counsel of Record



A P P E N D I X

ALASKA STATUTES

Section 25.23.100. Notice of petition, investigation and hearing.

(d) Except as provided in (g) and (i) of this section, an investigation shall be made by the department or any other qualified agency or person designated by the court to inquire into the conditions and antecedents of a minor sought to be adopted and of the petitioner for the purpose of ascertaining whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor.

(e) A written report of the investigation shall be filed with the court by the investigator before the petition is heard so long as the report is filed within 30 days of the designation by the court of the department, agency or person to make the investigation.

(f) The report of the investigation shall contain an evaluation of the placement with a recommendation as to the granting of the petition for adoption and any other information the court requires regarding the petitioner or the minor.

Section 47.05.010(7). Duties of department. The Department of Health and Social Services shall

(7) cooperate with the federal government, its agencies or instrumentalities in establishing, extending and strengthening services for the protection and care of homeless,

dependent and neglected children in danger of becoming delinquent, and receive and expend funds available to the department by the federal government, the state or its political subdivisions for that purpose;

Section 47.05.060. Purpose and policy relating to children. The purpose of this title as it relates to children is to secure for each child the care and guidance, preferably in the child's own home, that will serve the moral, emotional, mental, and physical welfare of the child and the best interests of the community; to preserve and strengthen the child's family ties whenever possible, removing the child from the custody of the parents only as a last resort when the child's welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the child is removed from the family, to secure for the child adequate custody and care.

Section 47.10.090. Records.

(a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, are privileged and may not be disclosed directly or indirectly to anyone

App. 3

without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain

App. 4

individual cases, enters an order prohibiting the disclosure.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$500 or by imprisonment for not more than one year, or by both.

Section 47.35.100. License required.

(a) Without a license issued by the department in accordance with its regulations a person may not operate an agency providing any of the following services:

- (1) the placement of children for foster home care;
- (2) the placement of children for adoption; or

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1913. Parental rights, voluntary termination

(a) Consent; record; certification matters; invalid consents

App. 5

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian

App. 6

child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provision of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the

App. 7

Indian child's tribe; or (3) other Indian families.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.